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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LORRAINE LODER,

Petitioner,

vs.

CITY OF GLENDALE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. THIS COURT'S RECENT DECISION IN *CHANDLER v. MILLER*, NO. 96-126, IS CONTROLLING, AND WAS NOT AVAILABLE TO, NOR CONSIDERED BY, THE CALIFORNIA SUPREME COURT

This Court's decision in *Chandler v. Miller* (No. 96-126) ___ U.S. ___ (April 15, 1997) controls the issues in this case, and was not available to the California Supreme Court at the time it issued its decision. "[W]here, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged." *Chandler v. Miller, supra*. In light of this decision, certiorari should be granted, and the case remanded to the California Supreme Court to comply with its holdings.

A. Respondent Failed To Present Evidence To Support Its Argument That There Was A Drug Problem In Its Workplace

Respondent attempts to distinguish *Chandler v. Miller* with a remarkable distortion of both the opinion of this Court and of the record of Glendale's drug

testing regime. Respondent argues that there was evidence in the record below of a drug problem in the city's workforce. (Respondent's Brief, p.1) Respondent begins its distortion by paraphrasing the lead opinion from the California Supreme Court, with a significant change. Respondent's Brief: "From 1983 to 1985, the City observed mounting evidence of drug use by municipal employees...." The lead opinion of the California Supreme Court: "From 1983 to 1985, the city's personnel department observed an increase in the number of city employee disciplinary cases in which substance abuse appeared to be a significant factor, as well as an increase in the number of city employees who voluntarily referred themselves for treatment for substance abuse." (Petitioner's Appendix, B-3, emphasis added)

The difference in the two versions arises from the record itself. Justice Mosk, in dissent, described the failure of Glendale to produce evidence of any meaningful drug problem in Glendale's workforce. (Petitioner's Appendix, B-104, B-105) Justice Mosk notes that Glendale's claims of drug abuse are based only on unsubstantiated suspicions. (Petitioner's Appendix B-105) Also, the record does not show any increase in even suspected drug related disciplinary actions, but merely that the number remained constant while overall disciplinary incidents decreased. (Petitioner's Appendix B-105) "[E]ven if these suspicions were well founded, the total number equals

about one half of 1 percent of the City's workforce. We have no way of knowing if these disciplinary problems were concentrated in some departments or were widespread." (Petitioner's Appendix, B-105)

Similarly, Glendale relies on its unscientific "pilot study" imposing drug testing of applicants to support its claim of a problem in the workplace. (Respondent's Brief, 1) By definition, the testing of applicants over two months says nothing about whether there was a problem in the workplace. As with Glendale's suspicions in disciplinary cases, the "pilot study" provides no information to allow the trial court to consider whether those failing the test concentrated in any particular job categories.

Chandler v. Miller, supra, clearly limited the scope of government drug testing absent individualized suspicion. It reiterated that testing would be permitted when there was a substantial and real risk to public safety. It explicitly rejected as a justification a general need for a "drug free" workplace. It pointed out that earlier decisions allowing testing, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989); *Vernonia School District 47J v. Acton*, 515 U.S. ___ (1995), must be confined to their specific and unique contexts. Those cases do not open "broad vistas for suspicionless searches". *Chandler v. Miller, supra.*

Respondent properly noted that Justice Kennard, dissenting below, criticized the testing regime as underinclusive, because all but the most addicted might simply abstain for a brief time. (Respondent's Brief, 7) It failed to mention that the same argument was part of this Court's reasoning when striking down Georgia's drug testing, in *Chandler v. Miller, supra.*

B. Respondent's Attempt To Link Its Drug Testing To An Existing Pre-Employment Medical Examination Is Not Supported By The Record

Given the clear direction of this Court in *Chandler v. Miller,* Respondent's contention that the Court would permit testing in the context of a pre-employment medical examination — when all that the Court said was that the precise issue of medical examinations was not before it and therefore not decided — is a weak attempt to avoid the Court's condemnation of dragnet, suspicionless testing, unrelated to the requirements of particular jobs and a showing of a substantial problem in the workplace. Moreover, Respondent, in describing its "medical examination" failed to state that the drug testing regime dramatically altered the medical examination it had previously imposed. The drug testing requires, for the first time, that new hires respond to a written inquiry disclosing all the medications they were taking, thus

also disclosing a host of medical and personal information not reasonably related to any job related medical screening. (Petitioner's Appendix, B-88, B-116) Also, the drug testing regime requires the new employee to partially strip, and to submit to monitored urination, also newly added to the old medical examination. (Petitioner's Appendix, B-88)

II. PETITIONER HAS STANDING AS A MUNICIPAL TAXPAYER AND RESPONDENT HAS NOT PRESENTED ANY REASON TO CHANGE WELL SETTLED LAW

Respondent's Brief recognizes that existing authority provides a municipal taxpayer with standing in the circumstances of this case. It cites the same cases which Petitioner relies on. *Frothingham v. Mellon*, 262 U.S. 447 (1923); *Asarco Incorporated v. Kadish*, 490 U.S. 605 (1989) Petitioner properly brought her taxpayer action, below, pursuant to California Code of Civil Procedure, Section 526a. The state Court of Appeal affirmed that standing. (Petitioner's Appendix D-31) Respondent did not challenge the statutory standing claim in the California Supreme Court. Thus, Respondent now asks this Court to overturn long established Article III standing for municipal taxpayers, in a manner which would evade review of the very constitutional issues which California, as a matter of

state policy, has determined it wishes to address through the mechanism of municipal taxpayer standing. In considering that assault on stare decisis, Respondent fails to address the state's reliance on the established precedents, the need for respect for state laws which do not clearly conflict with our federal constitution, or the specific reasons for municipal taxpayer standing articulated in *Frothingham v. Mellon, supra*, and reaffirmed in *Asarco Incorporated v. Kadish, supra.*

A further issue would be unnecessarily raised by Respondent's unsupported invitation to revisit established standing principles. This Court has recognized the availability of taxpayer standing when fundamental constitutional rights, such as those protected by the Establishment Clause of the First Amendment, are threatened by state laws. *School District of the City of Grand Rapids v. Ball,* 473 U.S. 373, 380 note 5 (1985) In the instant case, the taxpayer challenge is to the expenditure of public funds to carry out a regime of suspicionless and unsupported searches

in violation of fundamental constitutional rights to privacy and freedom from government searches protected by the Fourth Amendment. Simply, applying established principles and stare decisis would avoid the need to reach that issue.

Dated: May 21, 1997

Respectfully submitted,

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